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## THE POWERS OF COURTS OF EQUITY.

### II. ACTION "IN REM" BY COURTS OF EQUITY.

We have thus far analyzed the meaning of the phrases *in rem* and *in personam* as used in the classification of (1) rights, (2) actions, (3) judgments and decrees, and (4) proceedings under judgments and decrees. This of course has all been preliminary to the attack upon our main problem: What are the powers of a court of equity, and to what extent is it true that "the law acts *in rem* while equity acts only *in personam*"? This latter statement was made in several of the quotations from eminent authorities printed at the opening of Part I of this article. We may perhaps introduce the present part of our discussion by the following quotation from a recent Wisconsin case:

"In the early stages of equity jurisprudence decrees were enforced only *in personam*. . . . This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity."<sup>1</sup>

There is of course a very wide gulf between this statement and that previously quoted, and in what follows an attempt will be made to show that the learned justice last quoted has come much nearer to stating the truth about modern equity than did the other learned authors and judges. Perhaps the best way to get at our problem is to examine a series of concrete cases and see exactly what it is that the chancellor does and does not do, comparing his action constantly with that of a law court in similar situations. Let us notice in each case the nature of: (1) the primary right, if there be one; (2) of the action; (3) of the decree; (4) of the procedure to enforce the decree. Before we do this, it may be well to notice another case of carelessness in the use of language of which writers and courts are guilty in discussing the problems that are dealt with by courts of equity. The reference is to the double meaning given to the word "jurisdiction". In its strict and proper sense "jurisdiction," so far as it relates to courts, means power to take valid action which will be binding on the parties until set aside or reversed by some competent tribunal. In the equity cases, however, in many cases all that is really meant by the statement

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<sup>1</sup>Timlin, J., in *McMillan v. Barber Asphalt Paving Co.* (1912) 151 Wis. 48.

that "equity has no jurisdiction" in a given case is, that equitable relief will not be given by courts of equity, though, if it were given, the decree entered, even if erroneous, would be binding on the parties until some competent tribunal took action to alter it in some way. This difference is an important one for the reason that, if the court had no jurisdiction, *i. e.* power, to make the alleged decree, there is no decree to which any attention need be paid. For example, commitment for contempt of an "injunction" granted by a court without jurisdiction results in an unlawful imprisonment, against which relief may be had by habeas corpus proceedings; if, on the other hand, the court had jurisdiction, the party disobeying is guilty of contempt, even though it is clear that on appeal the appellate tribunal will order the injunction dissolved. The importance of this distinction is well illustrated by the case of *In re Sawyer*.<sup>2</sup> The defendants in that case succeeded in obtaining their release upon habeas corpus proceedings, the majority of the Supreme Court of the United States taking the view that even though personal service had been had, courts of equity had no jurisdiction over the kind of dispute involved. The minority held that the court had jurisdiction and that the imprisonment was therefore lawful, even though it was clear that on an appeal the injunction would have been dissolved as violating well-settled rules for the exercise of equitable jurisdiction. This case illustrates an important fact, often lost sight of, that even though the court of equity has jurisdiction over the parties, it may still be without jurisdiction over the subject matter in controversy. In the case of *Toller v. Carteret*,<sup>3</sup> already cited, the learned Lord Keeper was guilty of this error, his argument being that since the defendant was served within the jurisdiction, the court necessarily had power to enter a decree *in personam*.<sup>4</sup> In this discussion we are of

<sup>2</sup>(1888) 124 U. S. 200. The Mayor and City Council of Lincoln, Neb. were preparing to remove one Parsons from the office of police judge. He obtained a preliminary injunction from the Circuit Court of the United States on the ground that the federal Constitution was being violated. The Mayor and Council proceeded with the removal proceedings and Parsons was forcibly removed from office. Attachments for contempt were issued and the Mayor and Council were adjudged guilty of contempt and fined. Failing to pay the fines, they were taken and held in custody by the marshal. Thereupon they petitioned the United States Supreme Court for a writ of habeas corpus, which was ordered issued.

<sup>3</sup>(1705) 2 Vern. Ch. 494.

<sup>4</sup>Other illustrations of this lack of jurisdiction because of the subject matter of the litigation, even though the parties have been personally served, are to be found in the following cases: *Dickey v. Reed* (1875) 78 Ill. 261; *Fletcher v. Tuttle* (1894) 151 Ill. 41, and cases cited in the

course dealing only with the question of jurisdiction in the strict sense, *i. e.*, the powers of courts of equity to take valid action.

Let us begin by comparing what happens in the case of a bill in equity, the object of which is to obtain a decree solely for the payment of a sum of money, with the corresponding proceedings in an action in a court of law, the object of which is to obtain a money judgment. For example, in an ordinary bilateral contract for the purchase and sale of real estate, the vendor asks specific performance. Under the English and many American authorities he is entitled to this, and this is here assumed. The decree being duly entered, what happens? How does it differ from what happens under a judgment at law where the unpaid vendor (who has conveyed the property) obtains judgment for the purchase price? In both cases the primary right is *in personam*; the actions, the judgment and the decree are all *in personam*. Not until we reach the procedure to enforce judgment and decree respectively do we find any difference.

The judgment at law reads that plaintiff recover so much money; the decree in equity, that defendant is ordered to pay the sum. The traditional chancery procedure of course was, in the first instance, to commit the defendant to jail for contempt.<sup>5</sup> Before discussing this let us follow the common law procedure on the judgment. Execution is issued either against the person or property of the defendant. In speaking of execution against the person, Blackstone says: "The intent of it [the writ of *capias ad satisfaciendum*] is to imprison the body of the debtor till satisfaction be made for the debts, costs and damages. . . . The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demands, and if he does not then make satisfaction, *he must remain in custody till he does*. . . ."<sup>6</sup> When a man is once taken in execution upon this

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opinion in that case; *State v. Aloe* (1899) 152 Mo. 466, 47 L. R. A. 393. The last case contains an interesting use of the extraordinary legal writ of prohibition. The state Supreme Court issued a writ of prohibition to prevent the Circuit Court from assuming jurisdiction in equity over removal from office. To find a legal writ used directly to restrain a court of equity from acting beyond its powers is certainly an interesting development, but in view of the present organization of courts in the State in question, entirely justifiable.

<sup>5</sup>Whether this can be done to-day in all cases of decrees for money will be discussed below.

<sup>6</sup>The italics are the present writer's.

This is, of course, generally not the law to-day in the United States.

writ, no other process can be sued out against his land or goods."<sup>7</sup> This form of execution might be had upon almost every species of complaint, though in the earlier days this was not true. If the plaintiff gave the defendant, when in execution, permission to go at large, the judgment was discharged, irrespective of the intention of the plaintiff.<sup>8</sup> This seems to have been a consequence of the rule which forbade the suing out of other process after taking defendant on a *capias*. The mere imprisonment itself, however long, (unless for life), apparently never had the effect at common law of discharging the judgment.<sup>9</sup> If the judgment creditor chose, instead of taking defendant on a *capias* he could sue out a writ of *fieri facias* against the defendant's goods and chattels; or a writ of *levari facias* against his goods and the profits of his lands; or a writ of *elegit* against his goods and the possession of his lands.<sup>10</sup> It is to the proceedings upon the writ of *f. fa.* that attention is usually directed by writers who are comparing law and equity. Here of course the law proceeds *in rem*, the sheriff selling the goods and chattels (including chattels real) until he has raised enough to satisfy the judgment. Under the writ of *levari facias* in addition to seizing and selling the goods, the sheriff could receive the rents and profits of defendant's lands and apply them on the judgment. Under the writ of *elegit* the goods and chattels of the defendant were not sold, but appraised and delivered to the plaintiff at the appraised price, in whole or part satisfaction of his debt.. If the goods were insufficient, then a moiety of lands which defendant had at the time of the judgment was also delivered to the plaintiff, to hold till out of the rents and

<sup>7</sup> Blackstone, Comm. \*414-415. The *ca. sa.* could be sued out, as a general rule (to which there were many exceptions), only against such as were liable to be taken upon a *capias ad respondendum*. 3 Bl., Comm., c. XXVI. It seems to have been the universal rule at common law that whenever a *capias* was allowed on mesne process, it could be had on the judgment itself: 2 Cooley's Blackstone, 257, note (2). The *capias* on mesne process at common law originally could be had only in cases of injury accompanied by force, such as trespass; but by various statutes, and judicial legislation, by means of fictions, was extended to cover account, debt, detinue and finally all actions on the case. The last extension was made by the Statute of 19 Henry VII, c. 9; 3 Bl. Comm., c. XIX.

<sup>8</sup> 2 Cooley's Blackstone, 257, note 3, and cases cited there; Freeman, Executions (3rd ed.) § 464.

<sup>9</sup>The reference is entirely to the common law rule. Under modern statutes the rule is doubtless everywhere different.

<sup>10</sup> 3 Bl. Comm., c. XXVI. The writ of *elegit* was introduced by the Statute of Westminster II, 13 Edw. I, c. 18. The common law prior to that time limited the plaintiff to goods and the present profits of lands.

profits thereof the balance of the debt was satisfied or defendant's interest expired.<sup>11</sup>

Let us now return to the chancery proceedings. Suppose that, after the defendant had been put in jail for non-payment, he still remained obdurate: What happened? If proper proceedings were taken, a writ of sequestration was issued. The sequestrators under the sequestration could take all the goods and chattels in the possession of the defendant, or which they could come at without suit or action. The writ of sequestration also authorized the sequestrators to enter upon all "messuages, lands, tenements and real estates" of defendant, and to "collect, take and get into their hands the rents and profits thereof". Where the sequestration was for non-performance of a decree (for the payment of money) a sale of goods and chattels thus acquired could be ordered and the proceeds were applicable to the payment of the plaintiff's demand. This was done only on application to the court by the party in whose favor the decree was entered. Under this proceeding "it seems that the court will direct the sale not only of perishable commodities, but also of goods, such as rents paid in kind, or the natural produce of a farm, or household goods and furniture. The court will not sell terms of years, or leasehold estates, or any subject which passes by title and not by delivery, although it will direct the profits to be applied; because sequestrators can give no warranty for title, the property not being vested in them." Leases of land also were granted by the sequestrators under authority of the court and the rent applied to the plaintiff's demand.<sup>12</sup> We are now in a position to see to what extent these methods of procedure really differ. In practical effect there is some but only a little difference. In both cases the defendant may be imprisoned until he pays the sum due. Is the object of imprisonment in both tribunals to compel the defendant to pay the amount of the plaintiff's claim? The common law court did not in form order the defendant to pay, and it was Professor Langdell's idea that the court was not trying to make him do so. He says:

"A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. . . . Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judg-

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<sup>11</sup>3 Bl. Comm., *loc. cit.* Execution against lands in the modern sense was unknown even in Blackstone's days, except where the Crown was plaintiff. Martin, Civil Proc. at Common Law, § 383. See note 20, *infra*.

<sup>12</sup>2 Daniell, Chancery Practice (1st ed.) 630-650; (2nd ed.) 1259-1265.

ment; but his body is taken (as his property is) in satisfaction of the judgment."<sup>13</sup>

It seems difficult to reconcile this view with what common law writers like Blackstone say, and also with what the court did. Defendant could be kept in jail until he paid. This rule is hard to understand if imprisonment were really regarded as satisfying the judgment, for one would expect (as under some modern statutes) an imprisonment for a definite time, depending perhaps on the amount of plaintiff's claim.<sup>14</sup> The fact that the judgment was discharged if the plaintiff gave the defendant permission to go at large after arresting him on a *capias* seems to be a necessary result of the other rule that the common law would not permit plaintiff to adopt any other method of execution if he chose to arrest the defendant on a *capias*.<sup>15</sup> However, assuming for the moment that Professor Langdell's theory is correct, the fact remains that the common law court put the same personal pressure on the defendant that the chancellor did. In whatever sense we use *in rem* as applied to procedure to enforce judgments and decrees, the common law court when it imprisoned the defendant was not acting *in rem*. If acting *in personam* means merely dealing with a defendant's physical person by imprisoning him, the law does act *in personam*. If, however, we say that a court is not acting *in personam* unless the object of the imprisonment is to induce the defendant to pay, the law court, if we accept Mr. Langdell's views as to the object of the imprisonment, is not acting *in personam*, but equity is. That, however, the object of the imprisonment of the defendant at law and equity is the same, *viz.*, to induce him to pay the plaintiff's claim, seems very clear, both from what is said about it in the books and also from certain rules which are identically the same in both courts. Under the *capias ad satisfaciendum*, says Blackstone,

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<sup>13</sup>1 Harvard Law Rev. 116-117.

"A conspicuous example of this in modern law is found in the case of municipal corporations, which often have the power to impose penalties, which, if not paid, result in defendant's imprisonment for a definite time in proportion to the amount of the penalty.

<sup>14</sup>This rule may suggest that Prof. Langdell's view is correct; but the fact that if the plaintiff chose an *elegit* he could not, after getting into possession of the land, whatever its kind or value, thereafter have a *capias*, seems to show that this is not true. No one would contend that the judgment was satisfied until, by means of the *elegit*, the amount of plaintiff's claim was realized. Imprisonment for life did result in ending the judgment, but nothing short of that would do. The statute of 21 Jac. I, c. 24, prevented even this result, by enacting that if defendant died while imprisoned under a *capias*, the plaintiff could sue out a new execution, either against lands, goods or chattels.

"When a defendant is once in custody, he is to be kept *in arcta et salva custodia*; and if he be afterwards seen at large, it is an *escape*; and the plaintiff may have an action thereupon against the sheriff for the whole of his debt."<sup>16</sup> Compare with this Daniell's statement as to the duty of the sheriff in the equity case: "It is to be observed, however, that an attachment for non-performance of a decree is not, like an attachment for non-appearing or answering, a bailable process, and that the party, when taken upon it, must be committed to prison, and not suffered to go at large. And it seems, that if, after arresting a defendant upon an attachment for not obeying a decree or order for payment of money, the sheriff suffers him to go at large, the sheriff himself will be ordered, upon motion, to pay the money. A similar order was made by Lord Eldon, who ordered a sheriff not only to pay the money for which the attachment was issued, but the costs of the contempt incurred by the party and of the application."<sup>17</sup> The fact that defendant's poverty prevented him from discharging the judgment did not entitle him to be released if imprisoned under execution against the person; and the same thing seems to have been true in equity.<sup>18</sup> The abolition of imprisonment for debt has of course changed this in both courts for many actions. In the light of all the evidence, it seems fair to say that the object, or one of the objects, of the imprisonment of a judgment debtor at law was to induce him to pay the debt. Even if this were not so, it seems that to imprison the defendant must fairly be called acting *in personam* rather than acting *in rem*. To do otherwise is to magnify unduly the differences that did exist between legal and equitable procedure in cases where the recovery of a sum of money was sought.

To sum up: The common law, as we have seen, restricted the plaintiff to this procedure *in personam* if he chose it, but did not require him to use it, and did not permit it in all actions. Equity, on the other hand, doubtless because its decree was in the form of an order to the defendant to do his duty, required plaintiff to proceed *in personam* in the first instance, and refused to allow him to get at the defendant's property until it appeared that procedure against the person of the defendant had been unsuccessful in

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<sup>16</sup>3 Bl. Comm., c. XXVI.

<sup>17</sup>2 Daniell, Chancery Practice (2nd ed.) 1252.

<sup>18</sup>"Inability is never an excuse for not performing a decree for payment of money." Langdell, Brief Survey of Equity Jurisdiction, 53.

bringing him to terms.<sup>18</sup> When the procedure *in personam* had failed, equity permitted in addition the use of procedure against the property of the defendant. If the plaintiff at common law used execution against property, he could get at defendant's goods and chattels (including chattels real) and the rents and profits of his land, and also get possession of a moiety of the land in order to get the rents and profits of the same. The title to goods and chattels passed either to the execution purchaser if they were sold, or to the plaintiff if they went to him under an *elegit*; and the same was true of the rents and profits. Interests in land (other than chattels real) could not be got at, *i. e.*, there was no procedure *in rem* in the common law court (the judgment being *in personam*) to transfer title to land.<sup>19</sup> Under the sequestration in equity, the result was very much the same. Goods and chattels and rents and profits of land could be got at, but not interests in land.<sup>20</sup> Can we say that equity was still acting *merely in personam* while the law court was acting *in rem*? In speaking of writs of sequestration, Professor Langdell maintained that "after all these are scarcely exceptions to the rule that the chancellor has no jurisdiction *in rem*. . . . The power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given to him by statute."<sup>21</sup> Now it must be noted that Daniell assumes that the purchaser under the sale by the sequestrators got title, and it seems that the chancellor did make just this assumption.<sup>22</sup> No decision of a common law court has

<sup>18</sup>2 Daniell, Chancery Practice (2nd ed.) 1252.

<sup>19</sup>An English statute of 1732, applying only to English colonies, subjected lands of the execution debtor to sale on execution. 17 Cyc. 950. The extension in England came much later, by the Statute of 1 & 2 Vict., c. 110.

<sup>20</sup>Apparently not even chattels real, though there seems to be no good reason why this limitation was adopted. *Choses-in-action* caused much discussion, but space to go into the matter fails. See *Keighler v. Ward* (1855) 8 Md. 266.

<sup>21</sup>Langdell, Summary of Equity Pleading (2nd ed.) 35, note 4. Note that the learned writer uses "jurisdiction *in rem*" to mean "power to pass title". Whether procedure *in rem* includes more than this will be discussed later; assuming, for the moment, this restricted use to be correct, it follows that the law court when it imprisons defendant on a *ca. sa.* is not acting *in rem*. If it is not acting *in personam*, (as I think it is), it must be doing some third thing for which we have no name. The learned writer had, in the text to which this note was appended, said: "To some extent the Chancellor has asserted and maintained the right to proceed *in rem*." He then describes writs of sequestration and assistance, and adds the note quoted from, thus seeming to maintain that in proceeding by sequestration and writ of assistance the chancellor was still acting *in personam*.

<sup>22</sup>2 Daniell, Chancery Practice (2nd ed.) 1256.

been found in any modern time—that is, after sequestration became the regularly accepted order of things,—settling the question. In view of all the evidence, the assertion that title to chattels did not pass under the sequestration sale seems to be not proved. It seems to be based upon a very wide generalization derived from the well-known fact that the chancellor never claimed to have (in the absence of a statute) the power to pass complete title to interests in real estate. When we recall that the common law court did not possess this power in most actions, this does not seem to warrant so sweeping a generalization. Undoubtedly Coke would have denied that the sequestrators could pass any title, for, as Daniell says:

"There appear, however, to have been great struggles between the Courts of Common Law and Courts of Equity before this process was established, the former holding that a court of Conscience could only give remedy *in personam* and not *in rem*, and that sequestrators were trespassers, against whom an action at law would lie; and to such extent does the objection of the Courts of Law to this process appear to have been carried, that according to a case cited by the Lord Chancellor [Nottingham], in *Colston v. Gardiner*, a question was entertained upon an indictment for murder, where one was killed on laying on a sequestration, whether the homicide was justifiable or not. 'Whereupon a pardon was sued out. . . . But these were such bloody and desperate resolutions, and so much against common justice and honesty, which required that the decrees of this Court, which preserve men from fraud and deceit, should not be rendered illusory, that they could not long stand', and the process is become, by long use and acquiescence, and is now looked upon, as the legal and ordinary process of the court."<sup>24</sup>

In view of all the evidence is it not probable that the correct statement is: Originally the chancellor could not act *in rem* in the sense of passing the legal title to property of any kind; but, in the development of our judicial system, he asserted successfully the power to do this in the case of chattels, by means of a sale under a writ of sequestration? Even if this be denied, it by no means follows that equity acts only *in personam*. If we recall that *in personam* means, in reference to procedure, nothing but bringing pressure to bear upon the defendant's physical person, it is clear that equity has done something which goes far beyond that. It has given the purchaser from the sequestrator: (1) full "equitable

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<sup>24</sup>Daniell, Chancery Practice, *loc. cit.*

title" to the chattels; (2) possession of the chattels; (3) the right to use all the powers of the court of equity to protect the possession and "equitable title". As a consequence of the possession, the purchaser thus becomes, according to the common law, owner as against all the world except the defendant. On the other hand, the plaintiff, having received money, has, and may of course transfer, an indefeasible title to it, and is as well off as the judgment creditor in the legal action.<sup>25</sup>

May we not say, then, that in the fully developed system judgment at law and decree in equity for the recovery of a sum of money were, in spite of differences in their form, enforced in ways which were equally effective practically and between which there was very likely no fundamental difference in legal theory? This is not to say that the differences which did exist were not of importance, for they most certainly were. Procedure *in rem* may be regarded as the normal mode of enforcing a money judgment at law; procedure *in personam* the normal mode, historically,<sup>26</sup> of enforcing a decree in equity for money. But at law procedure *in personam*, (or at least not *in rem*) could be and was used in many cases; and in equity procedure not *in personam* (and which very likely really was *in rem*) could be used whenever the normal procedure *in personam* failed. At any rate, we must say that if the common law did not at times act *in personam* in enforcing money judgments, it is hard to say what *in personam* means;<sup>27</sup> and that if the chancellor did not at times act *in rem* in enforcing decrees for money, he gave so good an imitation of it that it can with difficulty be distinguished from the genuine article.

Today of course it is generally provided by statute or rule of court that on equitable decrees for money, execution shall issue as in similar cases at common law. The federal equity rule reads: "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form

<sup>25</sup>If, as Professor Ames suggested, the court of law in *detinue*, when it sends the sheriff after property which is already the plaintiff's, is acting *in rem*, it seems that the court of equity does the same thing under sequestration, even if the purchaser does not get a legal title as against the defendant.

<sup>26</sup>This is not universally true to-day. See discussion, *infra*.

<sup>27</sup>In the entire comparison of law with equity, I have ignored entirely the extraordinary writs, such as mandamus, prohibition, habeas corpus, etc., in which, of course, the court of law acted *in personam* in every sense of the word.

used in the district court in suits at common law in actions of *assumpsit*.<sup>28</sup>

In other jurisdictions the decree when entered or when filed with the clerk of the Supreme Court, is given the force, effect and operation of judgments at law. No attempt has been made by the present writer to determine with exactness how early such statutes were passed in each of the different jurisdictions, but some of them go back to a very early date. In 1799 the legislature of New Jersey, for example, enacted that "the decree of the Court of Chancery shall, from the time of its being signed, have the force, effect and operation of a judgment at law in the Supreme Court of this State, from the time of the actual entry of such judgment". This language was to some extent ambiguous, and accordingly there was some dispute as to its meaning and effect.<sup>29</sup> In 1839 the legislature provided for the filing of decrees made in the Court of Chancery in the office of the Clerk of the Supreme Court; and finally, to settle all doubts, it enacted that "all decrees and orders of the Court of Chancery, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation and effect of a judgment at law in the Supreme Court from the time of the actual entry of such judgment, and the Chancellor may order executions thereon as in other cases."<sup>30</sup> Under provisions of this kind, of course, there is no doubt that title passes upon the execution sale which takes the place of the sale under the writ of sequestration. This change in procedure has not, however, altered in any respect the fundamental character of either the primary right or the action; they are still *in personam* as much as ever. The change is in the method of enforcing the decree. As we have already seen, either procedure *in personam* or procedure *in rem* may be used to enforce judgments *in personam* at law; and the same is equally true of equitable decrees *in personam*.

With this change has come another: the abolition of imprisonment for debt. Express constitutional provisions of this kind exist in most of our States. All modifications, conditions and restric-

<sup>28</sup>Federal Equity Rule 8. This rule is carried over into the new rules from the old rules. See also Rule 90. Even if the decree be not solely for money but includes that, the *f. fa.* may be used. *Western Pocahontas Co. v. Acord* (C. C. 1910) 178 Fed. 843. For the history of the English Law, showing that in 1838 the chancery court was given power to issue writs of *f. fa.* and *elegit*, see Street, *Federal Equity Practice*, § 2197.

<sup>29</sup>*Van Buskirk v. Muloch* (1840) 18 N. J. L. 184.

<sup>30</sup>*Mutual Ins. Co. v. Newton* (1888) 50 N. J. L. 571.

tions upon imprisonment for debt provided by the laws of any State are by act of Congress applicable to process issuing from federal courts to be executed therein.<sup>31</sup> The effect of these provisions upon equitable decrees for the payment of money thus becomes a question, more especially in States in which execution may issue upon such decrees, but also in those still using sequestration. For example, if a particular provision be held to apply to an action for breach of contract at law, will it also apply to an equitable decree for money based upon the same contract? If the vendor (who has conveyed) in a suit at law for the purchase price cannot have execution against the person, can he (if he has not conveyed) get it by bringing a bill for specific performance? No attempt can be made to answer this question in detail here.<sup>32</sup> It must suffice to point out that it seems to be commonly held that these provisions apply not only to legal but to corresponding equitable actions.<sup>33</sup> To quote from the Pennsylvania court's opinion in the case cited in the last note: "The main object of the statute . . . was to relieve from imprisonment in all cases where no offense appears, except that of omitting to pay money due on a contract. . . . The power to imprison for the purpose of enforcing a decree for the payment of money due on a contract no longer exists." We have thus the interesting result, in States taking this view, that judgment at law and decree in equity for the payment of money, where the action is one falling within the scope of these provisions, are both enforceable only by procedure *in rem*.

Apparently the end of the evolution of equity along these lines, with its tendency to eliminate the differences between legal and equitable procedure where the end sought is the same—to obtain payment of a sum of money,—has not yet been reached. In most jurisdictions there is no statute which provides that the equitable decree shall in form be converted into a money judgment, but in spite of this there is evidence that this is happening in appro-

<sup>31</sup> 17 Cyc. 1491; U. S. Comp. Stat. (1901) 709; Freeman, Executions (3rd ed.) 2414, and cases cited.

<sup>32</sup> To attempt to do so is beyond the scope of this article, the sole object of which is to present an analysis of the powers of modern courts of equity as they exist, both in the absence of statutes and under typical modern statutes.

<sup>33</sup> *Ex rel.* Scott *v.* The Jailer (Pa. 1855) 1 Grant, 237; Blake *v.* State (1875) 80 Ill. 11; Herrington *v.* Cassem (1898) 82 Ill. App. 594; Barclay *v.* Barclay (1900) 184 Ill. 375; People *v.* Spier (N. Y. 1877) 12 Hun 70. Not all of these are decisions, but they show the law to be as stated. See also Freeman, Executions (3rd ed.) § 451.

priate cases, at least in jurisdictions having code procedure. In the case of *McMillan v. Barber Asphalt Paving Co.*, already quoted from,<sup>34</sup> the court, after finding that the specific relief asked for, by way of cancellation of the bond, could not be had, affirmed a money judgment for the value of the bond and in doing so gave utterance to the words quoted. In other words, if legal judgment and equitable decree for money are to be enforced in the same manner, there is no reason why a difference in form should be retained.

Although the supposed "fundamental difference between law and equity" has thus been abolished for this group of cases in which money judgments and decrees are sought, there remains in reality a difference which may fairly be called fundamental. In the case put, if the vendor has not conveyed, he can at law recover, not the purchase price, but only damages for the loss of his bargain;<sup>35</sup> but by appealing to equity he can get a decree for the purchase price, on condition, of course, that he execute a deed conveying the land to the defendant. At law, if the jury find, or it is admitted, that the contract was made and all conditions precedent and concurrent were complied with, the plaintiff is entitled to judgment for damages. In equity, however, other considerations are taken into account. We must first find that the property is of the kind required for specific performance—land, unique chattels, etc.; also that no consideration of the interests of third parties or of the public leads the court to keep its hands off. The equitable doctrine of lack of mutuality will still apply. If the bargain is oral, and so unenforceable at law because of the Statute of Frauds, the equitable doctrine of part performance will still govern in equity. If the parties reduce the oral bargain to writing—"integrate it", as Wigmore has taught us to say—and in so doing fail because of mutual mistake to embody the terms of the oral bargain correctly in the written contract, at law the parol evidence rule will doubtless in many cases prevent the mistake from being set up as a defence to the action for damages for breach of the written contract; but in equity the mistake may be set up in the answer

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<sup>34</sup>*Supra*, note 1. *Acc. Luetzke v. Roberts* (1906) 130 Wis. 97.

<sup>35</sup>There are, of course, a few stray cases holding that the purchase price can be obtained in an action at law, usually no adequate reason being given; but this view is probably not law in more than one or two jurisdictions. In the case of personal property there is a doctrine which obtains at common law in a number of jurisdictions which really gives the seller of chattels the equivalent of specific performance. See Prof. Williston's article, 20 Harvard Law Rev. 363.

to the bill for specific performance.<sup>36</sup> The vendor may still have specific performance with abatement in price where there are defects in the quality or quantity of the *res*, even though at law there is a breach which prevents his suing for damages. Other differences could be mentioned, but time and space forbid. In other words, substituting procedure *in rem* by way of execution for procedure *in personam* by way of attachment for contempt does not in any way destroy the superior ethical character of equity as compared with the common law, and the discretion of the chancellor in granting or refusing relief still governs as much as it ever did.<sup>37</sup>

In our previous article we examined into the nature of the common law writ of partition and concluded that it was an action *in rem*, since the principal object of the action was to get at a specific *res* which defendant had; also that the judgment was *in rem*, in that it accomplished this object directly. We may now examine the bill in equity for a partition which took the place of the common law writ. The chancellor first awarded a commission to neighboring justices to determine how the land ought to be divided; then decreed the execution of mutual conveyances, not having the power by his decree to bring the result about directly. If the defendants refused to execute the conveyances, or if, after doing so, refused to surrender possession of any part to which they were not entitled, the chancellor would issue a writ of attachment, and if that were insufficient, a writ of sequestration, an injunction for the possession, and a writ of assistance directing the sheriff to put the parties into possession of their respective shares.<sup>38</sup> How does this differ from the common law action? The principal object of the action is clearly the same, to get at a specific *res* which defendant has. But the court of equity lacks the power to completely accomplish the object directly, since it can not pass the complete title by its decree or by virtue of anything its officers may do under the decree. It is therefore compelled to enter a decree ordering the execution of mutual conveyances. In our scheme of actions where shall we put such an action? Unlike the actions *in personam* thus far examined, the principal object is not to enforce a personal liability of the defendant; yet the decree is

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<sup>36</sup>Fry, Specific Performance, c. XV, and cases there cited.

<sup>37</sup>Of course, attachment may still be used in cases where imprisonment is not abolished for the corresponding legal action, and in cases where defendant refuses to execute deeds, to refrain from acts when enjoined, etc.

<sup>38</sup>Carteret v. Petty (1675) 2 Swanst. 323, note (a).

not directly *in rem*, *i. e.*, it does not vest title in the plaintiff; nor will any proceedings taken under it by officers of the court have that effect, at least not to the same extent as the common law procedure. It will be shown later, however, in connection with decrees against vendors of land for specific performance of contracts to convey, that the proceedings under the decree do ultimately, irrespective of what the defendant may do, have an effect which can only be described by calling it *in rem*. Can we say the decree is merely *in personam*? In form it is in a sense *in personam*, that is, it is a personal order to the defendant to do an act. But our classification is not based upon form alone, otherwise no judgment at law would be *in personam*.<sup>39</sup> Judgment *in personam*, as we have used it thus far, means a judgment of such character that by means of it the plaintiff can, as a means of attaining the principal object of the action, subject the general assets of defendant, as distinguished from some specific property interest, to the payment of his claim; and, in addition, or in lieu thereof, in some actions imprison the defendant until he pays—the imprisonment being thus a means of getting payment from defendant's general assets. Now the decree is not *in personam* in that sense. It orders the defendant to do an act, to convey a specific property interest—and imprisonment under the decree is merely a means of getting at this specific property interest; and the writs of sequestration and assistance have the same purpose. However, the decree does result incidentally in the enforcement of a personal liability if defendant is fined and imprisoned for not conveying. In this sense and to this extent, therefore, we may call the decree *in personam*. On the other hand, the proceedings under the decree are of varying character. In so far as the defendant's person is imprisoned in order to induce him to act, they are *in personam*. In so far as chattels are sequestered and sold to satisfy any fine imposed, they are *in rem* in the sense already discussed in connection with money decrees. The proceedings under the writ of assistance, by means

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<sup>39</sup>This might well have been discussed in the first part of this article, but it seemed better to leave it for discussion here. The common law judgment always reads as though the plaintiff were recovering a specific thing or *res* belonging to him: "it is considered by the court that the plaintiff do recover" his damages, his debt, his possession, etc. Prof. Ames did well to emphasize this difference in form, and the effect which the change of emphasis due to the fact that the equity decree was in form *in personam*, had upon the character of equitable doctrines as compared with the common law. But a difference in form, important as it may be, cannot be regarded as fundamental except as it corresponds to substance.

of which the plaintiff is put into possession of the land though without acquiring a complete title to it, are most certainly not *in personam* in any sense of the word, and must be called *in rem*, as will be discussed more fully later on.

How shall we classify an action of this kind? Its object is that of an action *in rem.*, *i. e.*, to get at a specific *res* which defendant has, and not to enforce a personal liability. To accomplish this the court of equity has to enter a decree in the form of an order *in personam*, ordering the doing of an act. The proceedings under the decree are, however, in part *in personam* and in part *in rem*. It is clear that in so far as the decree and proceedings under it are *in personam* in the sense above indicated, a statute authorizing constructive service against a non-resident would be invalid, *i. e.*, to the extent that it purported to empower the court on such service to enter a decree under which the defendant could be punished for contempt, such a statute could not be enforced,<sup>40</sup> but it would on the other hand undoubtedly be valid to the extent that it authorized on such service procedure *in rem*, *e. g.*, either putting the plaintiff into possession, as is done by the writ of assistance, or the more complete relief of vesting full title in him. To classify properly an action of this kind is difficult. From the point of view of the principal object, the real purpose, of the action,—the basis of classification we have thus far followed—it is *in rem*. For reasons familiar to all of us, connected with the historical development of equity, the decree has to be in form a personal order addressed to the defendant, and the proceedings under the decree are in part *in personam* (the defendant is imprisoned or subject to personal liability by way of fine), and in part not *in personam* (his general assets are sequestered, and sold if necessary to pay fine and costs, and possession of the land is given to the plaintiff). If we adhere to the basis of classification we have thus far followed, we shall say the action is *in rem*, though we shall of course not fail to notice how the object of the action is accomplished by a proceeding in form *in personam*. If by statute we endow the court—as is generally done today—with power by its decree, or action taken by its officers under the decree,<sup>41</sup> to vest full title in the plaintiff without calling on the defendant to do anything, the action becomes in substance identical with the

<sup>40</sup>State *v.* Nathans (1896) 49 S. C. 199, 225.

<sup>41</sup>In Hart *v.* Sansom (1884) 110 U. S. 151, the court said that this would still be acting *in personam*. This, of course, is so obviously untrue as to need no discussion.

old common law action, the only difference being that it is carried on in equity according to equity procedure without a jury. No one would then hesitate to call it an action *in rem*. But by such a change the real object of the action is not in any respect altered; the means of accomplishing the object have merely been simplified and rendered more certain of accomplishing their purpose. A more complete discussion of this will be given below, in connection with bills for specific performance.

A consideration of bills in equity for the specific performance of contracts for the conveyance of interests in land, the vendor being the defendant, will throw additional light upon this problem of classification. We can not compare such actions with any corresponding actions at law based upon contract, for the only remedy at law is by way of the enforcement of a personal liability for damages. Doubtless the action in equity is commonly thought of as brought for the enforcement of a personal duty to convey, and from some points of view this is doubtless true. But a consideration of what, in the absence of a statute, the chancellor really does in the developed equity system will suggest a different view. Of course he could not, any more than in the partition case, vest a complete legal title in the plaintiff.<sup>42</sup> As in the partition proceeding, he had to content himself in the first instance with entering a decree in form *in personam*, *i. e.*, a personal order to defendant to convey the land and to surrender possession to the plaintiff. If defendant refused, he could be attached for contempt. After getting out the attachment, the plaintiff could sue out a writ of injunction for the possession and then a writ of assistance, directed to the sheriff of the county where the land lay, commanding him to put the plaintiff into possession of the premises in question, pursuant to the decree.<sup>43</sup> Sequestration could also be used to induce defendant to execute the deed if he still refused, as well as, of course, to secure payment of any fine for contempt and of costs if awarded.

How does an action of this kind differ from a bill in equity for partition? In substance, that is so far as the principal object of the action is concerned, it seems, not at all. The principal object of the action in each case is to deprive the defendant of a specific *res* which he has, and not to enforce a personal liability.

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<sup>42</sup>The history of the development in the federal courts of equity will be discussed later. See note 52.

<sup>43</sup>Daniell, Chancery Practice (2nd ed.) 1280; 1 Spence, Equity Jurisdiction, 392.

The court of equity, however, again lacks the power completely to accomplish the object directly. It accordingly enters a decree, in form *in personam* (in the sense previously indicated); and proceeds to enforce this decree by procedure which is, in part, *in personam* (*i. e.*, the defendant is imprisoned), but which is in part not *in personam*, (*i. e.*, the sheriff is directed to put plaintiff into possession, and perhaps also to sequester property of defendant): If we follow the suggestion made above with reference to the equitable action for partition, we shall say that this action is in form *in personam* but in substance *in rem*. As before, we find the procedure under the decree to be not entirely *in personam*. When the chancellor by the writ of assistance directs the sheriff to put the plaintiff into possession, he can not be described as acting *in personam* in any sense in which that phrase can fairly be used, and it was suggested above that such procedure is really *in rem*. In discussing writs of assistance, an eminent writer in a passage, a part of which has already been quoted, says:

“After all, these are scarcely exceptions to the rule that the chancellor has no jurisdiction *in rem*. When he issues and enforces a writ of sequestration, or a writ of assistance, he merely exerts physical power over the possession of property, and this he can do, though he have no jurisdiction whatever *in rem*. A court which possesses that jurisdiction can by its judgment or decree take the title to property out of one person and put it into another.”<sup>44</sup>

Now it must be noted, as previously pointed out, that the learned writer here uses “jurisdiction *in rem*” as synonymous with “power to create and extinguish title”. This is of course very much in accord with our discussion of the phrase down to this point. However, the reader will recall that the Roman law use of the term in connection with actions was pointed out in Part I, and in that connection reference was made to the fact that Professor Langdell himself, following this, classified ejectment and replevin as actions *in rem*, since in them the plaintiff sought to recover a specific *res* belonging to him and not to enforce a personal liability against the defendant. But by means of a writ of assistance a plaintiff in equity in a proper case may obtain possession of property. If, in pursuance of the decree, the defendant has already conveyed the title, but refuses to surrender possession, the physical *res* of which the plaintiff obtains possession, is his, as in ejectment;

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<sup>44</sup>Langdell, Summary of Equity Pleading (2nd ed.) 35, note 4.

if the conveyance has not been made, the *res* is (at law) the defendant's but (in equity) ought to be the plaintiff's. In this connection it may not be amiss once more to call attention to Professor Ames's statement concerning the action of the court of law in *detinue*:

"The common law acts *in rem*. The judgment in *detinue* is, accordingly, that the plaintiff recover the chattel or its value."<sup>45</sup>

If by directing that the plaintiff recover possession of a physical *res* and by issuing execution directing the sheriff to put the plaintiff into possession of the same, the common law court, in ejectment, replevin and *detinue*, is acting *in rem*, can we say that because the form of the decree is *in personam*, the court of equity is acting merely *in personam* when ultimately, though perhaps not in the first instance, it issues a writ directing the sheriff to put the plaintiff into possession? Must we not broaden our definition of *procedure in rem* to include proceedings which through an officer of the court put some one out of and another person into possession of a specific physical *res*? Certainly such procedure is not *in personam*.

It must be noted that it was not necessary actually to imprison the defendant before the writ of assistance could be had, and in the developed system of equity, it seems that not only was a plaintiff who wanted possession of land, and who had obtained a decree against the defendant for delivery of the same, not required to proceed *in personam* against the defendant; he was forbidden to do so. In *May v. Flook*,<sup>46</sup> after a decree directing defendant to deliver possession of land to plaintiff, the writ of execution of the decree was served, and, defendant not obeying, an attachment for contempt was issued against him and he was imprisoned. This was held to be an erroneous procedure, and he was discharged out of custody and given costs. A writ of injunction for the possession was then issued and served, after which the writ of assistance directed to the sheriff was issued to put plaintiff into possession. Defendant then sued plaintiff at law for assault and false imprisonment, all of which had taken place under the apparent authority of the attachment. Plaintiff applied to the court of equity to stay the legal proceedings, and on his "submitting to make the

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<sup>45</sup>Lectures on Legal History, 76.

<sup>46</sup>(1772) 2 Sim. \*407; 1 Jac. & W. 663. The latter report contains the order for defendant's discharge from custody and the order referring to a Master the question of defendant's damages for imprisonment.

defendant such satisfaction for his imprisonment as should be approved of by the master" the action at law was stayed and the matter referred to a Master. In other words, the form *in personam* is retained, but in fact procedure *in personam* is not only not required, it is forbidden. In observations submitted to the Lord Chancellor, John Dickens, senior register of the Court of Chancery, said: "There are instances in which attachments *are not to be executed*: One . . . is, the attachment that is issued for not obeying a writ of execution of an order, to deliver possession of land, which is merely for the purpose of obtaining an order, for an injunction to enjoin the party to deliver possession". In other words, getting out the process as though procedure *in personam* was to be used has become a mere formality, which must be gone through with before procedure *in rem* can be had.<sup>47</sup> Must we not modify the usual statements, such as:

"If a court of equity decides that the defendant in a suit ought to . . . deliver property to the plaintiff, it does not render a judgment that the plaintiff recover . . . the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to . . . deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it."<sup>48</sup>

Of course this prohibition of procedure *in personam* applied only to cases where procedure through the sheriff was feasible, as in the case put of decrees for possession; in fact it seems to have been limited to such decrees; and in specific performance cases, defendant could be attached for contempt and imprisoned for the failure to execute the deed. To describe the writ of assistance as "a last resort" as some writers do, or to say, as the same writers do, that "the chancellor could only enforce his orders and decrees

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<sup>47</sup> *Acc. Dove v. Dove* (1783) 2 Dick. 617, 618; 1 Cox Ch. 101; *Green v. Green* (1828) 2 Sim. \*394. On the necessity for suing out and serving an injunction for possession, before a writ of assistance could be had, see *Stribet v. Hawkie* (1744) 3 Atk. 275.

<sup>48</sup> *Langdell*, 1 Harvard Law Rev. 117. The form of the proceeding is correctly described, but not the substance. The careful preservation of the form after the substance has departed is very misleading, as *May v. Flook* shows. Decree, writ of execution, attachment, injunction for possession—all point to procedure *in personam*. They are, in fact, in this group of cases mere formalities leading up to the process *in rem*—the writ of assistance. The result was a common-sense one, and to be expected. The chancellor saw the sheriff putting plaintiffs-in-ejectment into possession every day, and it was natural that he should adopt this procedure in place of, and not merely in addition to, trying to make the defendant do it himself.

by process *in personam*", seems hardly a fair statement of what actually took place.<sup>49</sup>

Let us look at the matter from still another point of view. Consider for a moment the effect of this action of the court of equity, taken through its officer, the sheriff. By obtaining through the sheriff the possession of the land, the plaintiff disseised the defendant. He was then recognized by the common law court as being the owner of the land as against all the world but the disseisee. On the other hand, the defendant, being thus disseised, was not, according to the common law, owner against any one. So long as the disseisin lasted, the disseisee could not sue any one for interfering with the land in any way. All he had left at common law was a non-assignable chose-in-action, *viz.*, his power by entry or action to regain the seisin and so the title.<sup>50</sup> In other words, the court of equity, acting through its officer, without the cooperation and against the will of the defendant, created a state of facts to which the common law attached the legal consequences that the defendant lost his title, though he retained a common law power to regain it; while, on the other hand, the plaintiff gained a defeasible legal title. Can we fairly say that the court which in this manner brings to pass a state of facts which has these legal consequences is, in doing it, acting merely *in personam*? Compare the proceeding with a common law execution sale by the sheriff. The common law court through its officer creates a state of facts to which the common law attaches the legal consequence that title passes from the execution debtor to the purchaser at the execution sale. If all formalities have been complied with, the title in this case is indefeasible, but is not that, important as it is, the only substantial difference?

To-day of course by statute nearly everywhere the court of equity has been given power to pass the complete legal title to the plaintiff, either directly by its decree, or by the less direct but equally effective process of appointing a Master or some other person to execute a deed for, and in the name of the defendant. In England this was accomplished by Sir Edward Sugden's Act.<sup>51</sup>

<sup>49</sup>See 2 Daniell, Chancery Practice, (2nd ed.) 1281, for the Statute of 1 Wm. IV, c. 36, § 15, rule 19, which did away with the necessity for obtaining all these preliminary writs and allowed the writ of assistance to issue as soon as proof was given that defendant had disobeyed the decree. Form was thus made (except as to the decree itself) to conform to substance.

<sup>50</sup>Ames, Lectures on Legal History, "Injuries to Realty", 224-230.

<sup>51</sup>2 Daniell, Chancery Practice (2nd ed.) 1279; Stat. 1 Wm. IV, c. 36, rule 15.

Similar legislation exists in nearly all the States, and in the federal courts Rule 8 of the new federal equity rules now covers the matter.<sup>52</sup> Under many such statutes the decree is still in form *in personam*—a personal order,—but by virtue either of the decree itself or the proceedings taken under it, the complete title passes to plaintiff. Doubtless under other statutes the decree may be in form either *in rem* (*i. e.*, it may purport itself to vest the title in the plaintiff) or *in personam*, or perhaps both. Under all of them the equitable action against the vendor for specific performance is clearly an action *in rem*, both as to its object and as to the effects of the decree and proceedings under it, and the same is true of the partition proceeding, as already indicated.

All actions against express or constructive trustees, the object of which is to obtain a conveyance of the legal title, are of course of the same character, and should therefore be classed as actions *in personam*—a personal order,—but by virtue either of the decree breach of trust, the action is an equitable action *in personam*.<sup>54</sup>

If the action for specific performance of a contract to convey land is an action *in rem*, it may be asked how it comes about that

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<sup>52</sup>There seems to have been no statute or rule of court which authorized this procedure until a provision was inserted at the end of Rule 8 in the new rules. Apparently the federal courts of equity originally assumed and exercised this power without a statute or rule of court. The question might well be asked, even with a rule of court, what power has a court, authorized by statute to frame rules of procedure, to introduce a change of this kind, which involves conferring additional power on the court of equity, and not merely regulating the manner of exercising powers already possessed? Apparently in making the rule the Supreme Court thought of it as involving merely a matter of procedure.

<sup>54</sup>A constructive trust has been described as "merely a remedy". 27 Harvard Law Rev. 127, note. Perhaps what is meant is that the most conspicuous thing about a constructive trust is not the existence of the personal duties which play so large a part in express trusts, but the power over the *res*. In express trusts, in addition to the power *in rem*, the cestui may call upon the trustee for the doing of all kinds of acts and hold him personally liable if they are not done. These personal duties are very largely, though not entirely, absent in the case of constructive trusts.

"As suggested in the preceding note, there are some personal duties in the case of constructive trusts. In the case of an infant trustee, since he is not personally liable for breach of trust, it seems that he is not under a personal duty to the cestui; what the latter really has is a power over the *res*. If the *res* is exchanged by the infant trustee for another *res*, the court gives the cestui a similar power over the new *res*. Undoubtedly the infant would be restrained by injunction from destroying or dissipating the *res*. This raises an interesting problem, the discussion of which space forbids: How shall we classify equitable actions seeking injunctions to preserve a *res* for the plaintiff until such time as he is entitled to the *res* itself? They do not seek to enforce a personal liability, or, necessarily, to prevent a wrongful act, for in the case put, the infant is not personally liable if he does the act. They are therefore not actions *in personam* as we have defined them. May we not broaden our concept of actions *in rem* so as to include these?

if the court has jurisdiction of the parties it can and generally will, according to the settled principles of equity, decree specific performance even though the land be without the jurisdiction. The truth seems to be that this rule had its origin in the fact that the object of the action could be completely accomplished only by putting the decree into the form of an order *in personam*, and the argument was: in what we are doing, we are acting only *in personam*; we have jurisdiction of the parties, *i. e.*, *in personam*, and therefore we can act. This was the form that the argument in fact took, and it ultimately prevailed.<sup>65</sup> This result was reached the more easily as there seemed to be nothing unfair about the proceeding, the defendant having had his day in court. As a matter of fact, if we analyze the situation, we find that from the legal point of view the *res* of which the plaintiff seeks to deprive the defendant in an action *in rem*, is not only the physical object but also the congeries of legal rights, privileges and other jural relations which go to make up title or ownership. This congeries of jural relations, not being a physical object, can not of course have any physical *situs*. We are perhaps (in the case of legal ownership) in the habit of thinking of it as being where the land is. There is no inherent reason for this, and in the case of personal property we perhaps often follow a different notion. From the nature of things the law of the jurisdiction where the land is must in the final analysis determine who is entitled to the possession and enjoyment of it, since its tribunals and officers are the only ones that can deal with the physical *res*. Admitting this, it by no means follows that there is any inherent reason why the law of the jurisdiction in which the land is may not be that the congeries of rights, etc., known as ownership or title, may be transferred by acts done without the jurisdiction, whether those acts be those of the owner himself or of a foreign legal tribunal or its officers. It is everywhere recognized that the owner's voluntary deed, even though executed and delivered outside the jurisdiction in which the land is, passes the title. The same deed executed under the duress of a foreign court of equity seems also to be recognized as having the same effect, although if exerted by some private person the same duress (imprisonment, actual or threatened) would affect the validity of the deed. To call such a deed voluntary is of course a plain misstatement of the facts, but we

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<sup>65</sup>An interesting example of the same argument used in connection with the foreclosure of an equity of redemption in foreign lands is discussed below.

give effect to it as though it were voluntary.<sup>56</sup> As a matter of abstract logic, apart from legal precedent, there seems to be little real difference between recognizing the validity of a deed executed and delivered under the compulsion of a foreign chancellor and recognizing the validity of a deed executed in his name by a master appointed by the foreign court.<sup>57</sup> In any event, whatever the law may actually be upon this point, it is clear that the principal object of the action, even when brought for the conveyance of land outside the jurisdiction, is to deprive the defendant of a specific *res*, and an action of this kind is not an action *in personam*, if by that we mean an action to enforce a personal liability.

It may not be without interest to consider the proper classification of common law actions to recover possession of property which, as we say ordinarily, belongs to the plaintiff. It will be recollect that in Part I this question was raised and left open for discussion later. Let us examine the matter from the point of view suggested in connection with the discussion of writs of assistance. In ejectment the nominal object of the action is to put the nominal plaintiff into possession and to deprive defendant of it. The real plaintiff of course goes into possession with the assistance of the sheriff. By the action of the sheriff the defendant, who because of possession had title as against everyone except someone with a better claim, loses the title.<sup>58</sup> The real plaintiff by acquiring, or regaining, possession thus acquires or regains the title to the land. In other words, change of possession, as in the case of possession gained by the aid of the sheriff under the writ of assistance, results also in an alteration of the actual rights of ownership in the particular piece of land. Ejectment is therefore as much an action *in rem* as any other action, since its principal

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<sup>56</sup>It is curious that there is so little discussion in the books of this question of duress by the chancellor. It would seem to have been a very obvious point of attack for the common law court in the days when the two courts were competing for jurisdiction. We treat as a man's deed an instrument about the wording of which he is not consulted and which he executes and delivers in preference to going to jail for the remainder of his life; and say that legal title passed because the defendant conveyed it to the plaintiff! We consider the distinction between this, and a deed executed by a Master, for him and in his name, as a very important matter. Aside from inherited prejudices, is there any very great difference between the two things?

<sup>57</sup>Of course, as the preceding note recognizes, our law has always drawn a distinction between these two things, although to-day by statute nearly everywhere either may be done, so far as domestic land is concerned. May we not expect the same thing to happen ultimately even where foreign land is concerned?

<sup>58</sup>See note 45, *supra*.

object is to enforce not a personal liability but a power over a *res* which defendant has. Any personal liability of the defendant for his dealing with the property is of course enforced at common law by either an action of trespass *quare clausum*, for the original disseisin if there were one, or an action of trespass for mesne profits. The real nature of the ejectment action is concealed both by the fictions in which the whole proceeding is clothed and by the usual discussion of the action, which ignores both the title which defendant because of his possession has, and also the fact that one disseised has at common law really no title but only a power to regain title.<sup>59</sup>

With some changes this discussion applies to replevin and detinue. The most important difference which must be noted is that, even though a chattel be in the adverse possession of another, who thus because of his possession is owner against "all the world except the real owner", nevertheless the latter has a true right *in rem* against people generally that they shall not unlawfully interfere with the chattel. Violations of this right *in rem* give rise to actions of trover or case, according to what is done.<sup>60</sup> Unlike the disseisee of land, the dispossessed owner of a chattel still has a true right *in rem*; but the wrongful possessor is also owner, just as in the case of land. As regards third persons who interfere with the chattel, each one may assert and prove ownership. When the sheriff replevies the chattel and turns it over to

<sup>59</sup>That there were at common law incidental proceedings *in personam* is admitted by all writers, but the number of instances of this kind of procedure seem to be understated. For example, they were not uncommon in ejectment. If the judgment and process were regular and plaintiff was put into possession and the judgment afterwards reversed, the possession was restored to the defendant by writ of restitution, a proceeding *in rem*. If, however, the process under the judgment was irregular, but plaintiff was put into possession under it before it was set aside, possession was restored to the plaintiff by procedure purely *in personam*, i. e., the court ordered the plaintiff to surrender possession to defendant and attached him for contempt if he refused. See the form of the order in Doe d. Stephens v. Lord (1837) 7 A. & E. 610, 614. Proceeding through the sheriff, i. e. *in rem*, was not only not required, it was forbidden. Doe d. Williams v. Williams (1834) 2 A. & E. 381. Attachment for contempt was also used for non-payment of costs by a tenant who, after entering into the consent rule, refused at the trial to confess the lease, etc. Runnington, Ejectment, 415. If the defendant interfered with the sheriff while executing the writ for possession or later turned the plaintiff out of possession without relying on any new source of title, he was attachable for contempt. Runnington, Ejectment, 453; Kingsdale v. Mann (1703) 6 Mod. 27; see also Davies d. Povey v. Doe (1773) 2 W. Bl. 892.

<sup>60</sup>Pollock & Wright, Possession, 91-93; Whittier, Cases on Common Law Pleading, 189-194, and cases cited in the notes; Radcliffe & Miles, Cases on Torts, 318-319.

the plaintiff, the defendant's possessory title is destroyed, and this destruction becomes final if at the trial of the action judgment is for the plaintiff. An action of this character is fairly to be classed as *in rem* even though plaintiff already had a title, for the result is to extinguish the defendant's title and to enlarge the number of rights, etc., which compose plaintiff's title.<sup>61</sup> In the case of detinue the situation is somewhat more complex for the reason that the common law made no serious effort as it did in replevin to actually restore the chattel to the plaintiff. The judgment was in the alternative, that plaintiff recover the chattel or its value.<sup>62</sup> In so far as the recovery of the chattel is in view, the action is *in rem*; in so far as recovery of a personal judgment for the value of the chattel is in view, the action is *in personam*. This view of these common law actions is supported by the fact that in all of them constructive service against a non-resident defendant is permissible where the statute provides for it, in so far as they are *in rem* in the sense suggested, the physical *res* of course being in the jurisdiction. That is, statutes are valid which authorize the recovery on constructive service of the possession with the accompanying destruction of defendant's interest in the *res*; but in so far as these statutes attempt to permit the enforcement of a personal liability, either as a main object of the action, as in detinue, or as an incidental feature, they are invalid.<sup>63</sup>

In one of the passages quoted at the opening of Part I, the writer based the chancellor's lack of ability to act upon constructive service upon the alleged fact that equity acts only *in personam*.<sup>64</sup> As we have seen this statement is in substance incorrect; and, as a matter of fact, so far as many things the chancellor actually did were concerned, there was no inherent reason why he should not have acted upon constructive service. Undoubtedly the preservation of the form of the decree as *in personam* had much to do with the matter. However, constructive service is very largely if not wholly a creation of modern statutory law, for it seems to have been equally unknown in the common law actions. As in equity, to the extent that the common law actions, judgments and procedure were *in rem*, there was no logical necessity for the failure

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<sup>61</sup>Of course, in such an action as replevin, there are incidental objects *in personam*. This is true of many actions *in rem* where there is a liability for costs, etc.

<sup>62</sup>Martin, Civil Procedure at Common Law, § 85.

<sup>63</sup>Cloyd v. Trotter (1886) 118 Ill. 391.

<sup>64</sup>15 Columbia Law Rev. 38.

to develop this power. Simply as a fact of history, neither tribunal seems to have developed the ability to do this, with the possible exception noted below. To see that this was not a necessary result in equity so far as the substance of things was concerned, but was due rather to the retention of the in many cases outgrown form of decree *in personam*, let us ask the question: On a bill for specific performance against a non-resident defendant, if the land was in the jurisdiction, so far as what the chancellor really did was concerned, what reason was there why equity could not have allowed the plaintiff to invite the defendant to come in by giving him actual notice, and then, if he did not come, have awarded a writ of assistance directing the sheriff to put the plaintiff into possession? If defendant ever came into the jurisdiction and sought to enforce his common law power to regain title, the chancellor would of course have to follow this up by enjoining the defendant from thus disturbing the plaintiff. Of course, as a matter of historical fact, no such development did take place in the case of land, but attention may now be called to the fact that the chancellor did this very thing, in the case of chattels, in one class of cases, *viz.*, in bills of interpleader. If the physical *res* was in the jurisdiction, as of course it had to be in interpleader, the plaintiff turned it over to the court and was permitted to maintain his bill even though only one of the claimants was in the jurisdiction and the others were non-residents. This was, for example, the case in *Stevenson v. Anderson*,<sup>65</sup> as all but one of the defendants were residents of Scotland and had not been served in England. In giving his decision Lord Chancellor Eldon said: "The plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction within a reasonable time; if he does not, the consequence is, that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction, when they think proper to come within it. . . . If the plaintiff can show that he has used all due diligence to bring persons, out of the jurisdiction, to contend with those who are within it, and they will not come, the court, upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterward came here and brought an action, order service on their attorney to be good service, and

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<sup>65</sup>(1814) 2 Ves. & B. 407.

enjoin the action forever."<sup>66</sup> Obviously a court which acts merely *in personam* could not take such action, but it will be noticed that as against the absent defendants no action *in personam* of any kind is taken. The proceeding as between the defendants is *in rem* in the sense we have been using it. Consciously or unconsciously, we have here a development without statutory authority of an action *in rem* on constructive service, not by publication but by personal notice given to the non-resident absent defendant.

If space permitted, a very interesting comparison could be made between the proceedings in the peculiar common law action of replevin and those in equity for the specific restitution of a unique chattel which the defendant detained from the plaintiff. In the replevin proceeding if the defendant concealed the chattels, apparently pressure was brought to bear to induce him to produce them, first by taking chattels of his by way of counter-distress and eventually by way of attachment of his person.<sup>67</sup> The comparison between this and sequestration and attachment in equity is obvious. Of course in form legal writ and equitable decree differed—one was *in rem*, the other *in personam*—but under both we find analogous proceedings,—seizure of chattels, attachment of person, and delivery of the chattel in question by the sheriff if it can be found. The order in which these occur at law and in equity is, as one would expect, not the same, but the interesting fact is that all are present in both actions.

One of the most interesting examples of an equitable action *in rem* is the bill for strict foreclosure of an equity of redemption. Under the common law theory of mortgages as it existed in England, the mortgagee's legal title became absolute upon default by the mortgagor. To prevent the resulting injustice the chancellor endowed the mortgagor with an equity of redemption, and corresponding to this the mortgagee was given a bill to foreclose the equity of redemption. The essential part of the decree of strict foreclosure read as follows: "In default of the defendant's paying to the plaintiff the principal money, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed that the said defendant do stand absolutely debarred and foreclosed of

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<sup>66</sup> *Acc. Martinus v. Helmuth* (1815) Coop. 245. On the general subject, see 2 *Daniell, Chancery Practice* (2nd ed.) 1763.

<sup>67</sup> 3 *Street, Foundations of Legal Liability*, 209; 2 *Roscoe, Real Actions*, 650, 651. If defendant won at the trial, he was entitled to counter-distress and attachment for contempt if plaintiff made away with the goods so that the sheriff could not get at them. *Martin, Civil Procedure at Common Law*, § 356; 2 *Roscoe, Real Actions*, 650.

and from all equity of redemption of and in the said mortgaged premises."<sup>68</sup> The object of this action is obviously to cut off forever the mortgagor's equity of redemption, *i. e.*, to bring about the destruction of an equitable interest in land. No procedure *in personam* is attempted, nor is the decree even in form an order to the defendant to do anything. There is no attempt to enforce any personal liability or to do anything except deprive the defendant of his specific equitable interest in the land by destroying it. The decree itself, coupled with the final order entered confirming it if the defendant does not pay the amount due, operates *in rem* to extinguish this equitable interest of the defendant, and may be pleaded in bar to any future bill to redeem. In other words, the decree of the court of equity here has an effect upon an equitable property interest exactly analogous to the effect which the judgment of the common law court in partition proceedings had upon the legal property interests. The nature of the action and the effect of the decree appear most clearly if we suppose the defendant to be a transferee of the equity of redemption who has not assumed any personal liability. It is obvious that no action against him can be *in personam*, for there exists against him no personal liability to be enforced. What is asserted is a power *in rem*, exercised through the court, to deprive him of an equitable interest in the property in question. An equitable action for the strict foreclosure of a vendee's "equity of purchase" in land, where it is allowed,<sup>69</sup> is of the same nature. So are the decrees of strict foreclosure allowed in some of the "lien theory" mortgage States in the case of absolute deeds which are shown by parol evidence to be intended as mortgages.<sup>70</sup>

We are now in a position to consider the decision in the case of *Toller v. Carteret*,<sup>71</sup> to which reference has already been made. In that case strict foreclosure of an equity of redemption to land outside the jurisdiction was asked for and decreed. In the passage already quoted, Lord Keeper North held that since equity acts *in personam*, and the defendant was personally served within the jurisdiction, the court had power to act. When this same question came up later,<sup>72</sup> counsel for the defendant, in arguing against the

<sup>68</sup>2 Daniell, Chancery Practice (1st ed.) 643; (2nd ed.) 1204.

<sup>69</sup>Button *v. Schroyer* (1855) 5 Wis. 598.

<sup>70</sup>This is the rule in some States only; other lien theory States hold that although the deed is absolute in form the general legal title remains in the "mortgagor".

<sup>71</sup>(1705) 2 Vern. Ch. 494.

<sup>72</sup>Page *v. Ede* (1874) L. R. 18 Eq. 118.

jurisdiction of the English court of chancery, said: "We dissent from the proposition that a foreclosure decree is merely a personal decree. Inasmuch as it deprives the mortgagor of his estate . . . it is a direct proceeding *in rem*. . . . If the mortgagor does not pay . . . his equity of redemption will be divested and annihilated." This argument did not meet with the attention it deserved. How, it is submitted, can an intelligent decision in cases of this kind be rendered unless we notice the difference between enforcing a personal liability and depriving a defendant of a specific *res*? The *res* in question here is an equity of redemption in foreign land. In the case of an equitable interest in domestic land, the chancellor's decree and order of confirmation extinguish the interest. Has the chancellor the power to do this in the case of an equitable interest in foreign land? The decisions in the two cases assert that he has. Doubtless some courts would dispute it. As already suggested in the discussion of the transfer or extinction of legal interests, there seems to be no reason why to permit this is not a sensible system of law. If the chancellor be recognized as having this power, it should not be put on the ground that he is acting *in personam*, for that is untrue; but on the simple ground that since the congeries of rights and other jural relations which go to make up the equity of redemption need not necessarily be thought of as situated where the physical *res* is, there is no reason why the chancellor who has the defendant before him may not enter a decree, to which the law, both of the jurisdiction where the land is and of that where the decree is made, will attach the consequence that the equity of redemption will be destroyed. It is beyond the scope of this discussion to settle to what extent the rule laid down in *Toller v. Carteret* is law to-day in the United States; we must content ourselves with finding out what equity is really attempting to do in such a case.

It is interesting to compare the strict foreclosure in equity with a modern statutory foreclosure by sale. Here the object still is to enforce a power *in rem*, but in a different manner. In the so-called "common law" mortgage States, the *res* is the same as in the case just considered, but the effect of the proceedings is not merely to extinguish the defendant's equitable interest but also to vest in the purchaser at the foreclosure sale the legal interest of the plaintiff free from the defendant's equitable interest. In a "lien theory" State the *res* is the legal interest of the mortgagor, and the object is, not merely to extinguish it but to vest it in the purchaser, (free from any claim by the mortgagee to an interest

in it) in order to realize thereby a sum of money for the plaintiff. Assuming the defendant to be a transferee of the mortgagor who has not become personally liable for the mortgage debt, we see clearly that the action is *in rem*. Usually by statute the action for the enforcement of the personal liability, if it exists, may be combined with the foreclosure, the result being a deficiency decree or judgment.<sup>73</sup> If the mortgaged property be in more than one State, the questions raised by *Toller v. Carteret* appear. The usual method of avoiding them is by ordering the defendant to make a deed conveying the foreign land to the purchaser at the foreclosure sale, and to this deed made under the duress of the chancellor recognition seems generally to be accorded.<sup>74</sup>

All equitable actions to enforce equitable charges on land, including equitable mortgage vendor's (*i. e.*, grantor's) liens,<sup>75</sup> etc., are also obviously *in rem*, in so far as they enforce merely the equitable lien or mortgage; *i. e.*, in so far as no personal liability is enforced, but merely a power *in rem*.

In our scheme of equitable actions, where shall we place bills for the removal of cloud upon title? In the typical case the plaintiff seeks to deprive the defendant of a physical object upon which he bases the claim which the plaintiff alleges is not valid. The basis of the plaintiff's bill is that he owns the property and is in possession of it. He does not, therefore, wish to deprive the defendant of a specific *res*, if by that we mean an actual interest in the property. Neither, on the other hand, does he seek to enforce a personal liability—a power *in personam*—against the defendant. Apparently what he does seek is to deprive defendant of: (1) the physical object upon which he bases his claim; (2) any right to call upon the courts in the future to pass upon

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<sup>73</sup>In some States (*e. g.*, Missouri) mortgages may be foreclosed either by bill in equity (or the code substitute for same) or by a statutory legal proceeding. In the former, no deficiency decree can be had, *i. e.*, the action is *in rem* only; in the latter, a deficiency judgment can be had, *i. e.*, the proceeding combines an action *in rem* with an action *in personam*. In some States specific performance in the proper sense is denied to the vendor of land, but he is given a decree: (1) that the land be sold; (2) if there be a deficiency, *i. e.*, if the amount realized does not equal the purchase price, costs, etc., he is given a deficiency decree for that. Such an action is both *in rem* and *in personam*, whereas the original equitable action by a vendor for specific performance is purely *in personam*.

"See 1 Ames, Cases in Equity, 23.

<sup>75</sup>What is commonly called a vendor's lien ought to be called, for the sake of clearness, the grantor's lien, as more than one writer has suggested, in order to distinguish it from the right of a vendor who has not yet conveyed, which is often also called a vendor's lien.

the validity of his claim.<sup>76</sup> The first object is accomplished by an order in form *in personam*, but this can of course be followed by sequestration, etc., as well as attachment for contempt. The second object is accomplished by the application of the doctrine of *res judicata*, a thing which will be discussed later. It seems that an action of this kind is substantially *in rem*, since it involves as the object of the action not the enforcement of a personal liability but rather depriving the defendant of a specific *res*—the document of title on which he bases his claim, as well as his right as plaintiff to have the court pass upon his claim. Presumably if the document were in the jurisdiction, but the defendant, a non-resident, were outside, a statute authorizing constructive service and seizure of the document would be valid; but of course no personal judgment or decree, even for costs, could be entered.<sup>77</sup> To-day by statute a so-called action to remove cloud on title is allowed in many States on constructive service against non-resident absent defendants.<sup>78</sup> Usually the document on which the alleged invalid claim is based is in these cases not within the jurisdiction. An action of this kind seems to have as its sole object the second one of those above mentioned, *viz.*, to deprive the defendant of the right to call upon the courts at a later time to pass upon the validity of his claim. No personal liability can be enforced, even for costs. Inasmuch as this claim of the defendant relates to a physical *res* in the jurisdiction, such proceedings are held valid on constructive service. Consistently with our definition, we may say that this action is *in rem*, the *res* being however not an interest in the land but only the right to have the court hear his claim and pass upon its validity.<sup>79</sup> It may be well at this point to notice that in so far as the doctrine of *res judicata* applies, every action *in personam* has an incidental effect *in rem* of this same kind. This does not in

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<sup>76</sup>Whether an equitable adjudication as to the legal title of property will make the matter *res judicata*, either in equity or at law, will be discussed later in Part III.

"Presumably to-day, though there seems little authority upon the point, a court of equity would not hesitate to send the sheriff after the documents if defendant refused to surrender them and they could be found in the jurisdiction.

<sup>78</sup>Arndt *v.* Griggs (1890) 134 U. S. 316; Dillon *v.* Heller (1888) 39 Kan. 599.

<sup>79</sup>In referring here to the "right to have the court hear his claim," the matter is looked at from the point of view of the duty of the court to hear him. From the point of view of the defendant in such a suit—the present plaintiff—it may, of course, not be a true right, but only a privilege and a power, which the plaintiff would possess.

any way affect the validity of our distinction, which is based upon the principal object of the action.

Bills for the cancellation of sealed obligations constitute another interesting group of equitable actions *in rem* in the sense in which we have defined the term. For example, consider the case of a sealed obligation obtained by fraud. The obligor who seeks cancellation in a jurisdiction where, as at common law, fraud is no defense in a legal action on the instrument,<sup>80</sup> is seeking, not to enforce a personal liability for the deceit, but merely to deprive the defendant of a specific *res* which he has, *viz.*, a legal right *in personam* against the plaintiff, which right the defendant by means of his fraud has acquired from the plaintiff. This bill, therefore, has for its object the surrender of a specific *res* which defendant has, and may be compared to a bill asking reconveyance of real property obtained by fraud. Of course under the historical chancery system the chancellor could not deprive the defendant of the *res* merely by decreeing that the obligation was cancelled and the decree was not in this form, but in that of an order that the instrument be delivered up to be cancelled. This did not affect the legal validity of the instrument.<sup>81</sup> But if by means of its officers the court of equity should deprive an obstinate defendant of the physical instrument itself—a thing which, it seems, no court of equity in modern times would hesitate to do, accustomed as it is to sequestration and writs of assistance—it would thereby bring it to pass that defendant would lose his legal right *in personam*, for without the physical instrument he could not recover.<sup>82</sup> Procedure of this kind would have to be classed as *in rem* in the same sense as the procedure under writs of assistance in the case of land.

If by statute or judicial legislation the fraud of the holder of the sealed obligation has become a legal defence, it is still the rule in many jurisdictions that the instrument will be ordered to be delivered up for cancellation, and in some jurisdictions similar relief is granted in the case of written simple contracts obtained

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<sup>80</sup>As in the federal courts. Ames, Lectures on Legal History, "Specialty Contracts and Equitable Defenses", 104.

<sup>81</sup>J. R. v. M. P. (1459) Y. B. 37 Hen. VI, fol. 13, pl. 3; 1 Ames, Cases in Equity, i. Whether this is so to-day will be discussed later in Part III.

<sup>82</sup>Equity first allowed one who had lost a sealed obligation to recover; finally, in modern times, the law courts adopted the same view. Ames, Lectures on Legal History, "Specialty Contracts and Equitable Defenses", 104. Undoubtedly a law court would not allow a recovery where equity had deprived the plaintiff of the instrument.

by fraud.<sup>83</sup> Here of course the effect sought is not to deprive defendant of an actually valid right *in personam* against the plaintiff, but the action is to be compared to the bill for the removal of cloud upon title. To deprive the defendant of the physical object which is the basis of his claim and also to make the matter *res judicata*, seem to be the objects of the action. There is no attempt to enforce any personal liability as the principal object of the action. Essentially, therefore, the action is *in rem*. Whether the decree itself may not to-day have an effect *in rem* is left for future discussion. If the instrument whose cancellation is asked be a negotiable instrument to which there exists a personal or "equitable" defence, the object of the proceeding for cancellation is not only to deprive the defendant of the physical instrument and his right to a hearing in court as plaintiff, but also to deprive him of the power which he possesses of negotiating it to a holder in due course, the result of which would be to vest in the latter a valid right *in personam* against the plaintiff. This of course is an action *in rem*.

Our discussion has not by any means exhausted the list of equitable actions, but limits of time and space forbid the consideration of others. Before closing this part of the discussion, however, a word or two may be said concerning the statements so often made that all equitable rights are rights *in personam*; that they *had* to be such because of the fact that equity acts only *in personam*.<sup>84</sup> In the light of our discussion, it seems that two things may be said of this statement: first, that the premise is untrue; second, that even if the premise were true, the conclusion would not follow. As to the first point, nothing more need be said; as to the second, if the conclusions reached in Part I are sound,<sup>85</sup> a better example of a simple *non sequitur* could hardly be asked for, provided those making these statements mean by right *in personam* and right *in rem* what is usually meant by those phrases. In justice to these writers it must again be emphasized that often they seem to mean something else. Professor Ames's use of the phrase *in rem* was presented briefly in Part I,<sup>86</sup> and it seemed to be quite different from that of most writers. Professor Langdell's statement that "if equitable rights were rights *in rem* they would follow the *res* into the hands of a purchaser for value and without

<sup>83</sup>The cases are collected in 2 Ames, Cases in Equity, c. VII.

<sup>84</sup>15 Columbia Law Rev. 38.

<sup>85</sup>15 Columbia Law Rev. 53-54.

<sup>86</sup>15 Columbia Law Rev. 43.

notice" was referred to in the same connection and left for further discussion at this time. Apparently Professor Langdell, whose statements on this point are quoted with approval by Professor Maitland, means to deny the name right *in rem* to any right which is subject to the doctrine of *bona fide* purchase for value. Admitting the validity of this usage for a moment—though, as has been pointed out previously, current definitions and common usage do not so limit the phrase—two things must be said: first, it would not follow that all rights which are cut off by this doctrine of *bona fide* purchase for value are rights *in personam*; second, there is nothing about procedure *in personam*, whether it be in equity or at law, which requires it to be used only for the enforcement of rights *in personam* or rights not *in rem*, even using the phrase *in rem* in Professor Langdell's apparently limited meaning. On the second point, reference need only be made to the summary at the close of Part I,<sup>87</sup> and the first point has already been fully discussed earlier.<sup>88</sup> It must however be pointed out that any such restricted meaning of right *in rem* leads to the following conclusions: (1) If a chattel were sold in market overt, the *bona fide* purchaser for value would get a title good against the previous owner. Since there are an indefinite number of persons who may become purchasers in this way, it follows that the owner of a chattel at common law had not a right *in rem*, but only, (if rights not *in rem* are necessarily *in personam*, as seems to be so often assumed) a right *in personam*.<sup>89</sup> (2) The same argument may be repeated concerning ownership of chattels in England under the Factor's Acts, and in many States having similar legislation. The legal title is likely to be cut off by a sale made by one not the owner to a *bona fide* purchaser for value, hence the conclusion as above. (3) Under modern recording acts, if A conveys Blackacre to B who does not record, undoubtedly title passes to B subject to a power in A to destroy B's title by conveying to a subsequent purchaser. If the latter falls within the provisions of the recording act, he acquires a title on complying with the act before B records his deed, and B's title is divested. Must we therefore conclude that by the first conveyance B got only a right *in personam* and not a right *in rem*? (4) In the case of money, an indefeasible

<sup>87</sup> 15 Columbia Law Rev. 53-54.

<sup>88</sup> 15 Columbia Law Rev. 42-43.

<sup>89</sup> This is the same argument applied to legal ownership of chattels that is used by a learned writer in 28 Law Quarterly Rev. 296, to prove that an equitable interest is merely a right *in personam*.

title to that may of course be passed by a thief. Has the owner of money not a right *in rem* and only a right *in personam*? (5) Ownership of mercantile specialties we usually think of as including not only the right *in personam* but also a right *in rem*, or title. If the negotiable instrument be payable to bearer, one who steals it can pass a valid title to a holder in due course. Following the line of argument used in the other cases, it follows that the owner of a negotiable instrument payable to bearer has no title in the sense of a right *in rem* but only a right *in personam*. (6) Finally the case of one wrongfully in possession of a chattel may be considered. He is owner against "all the world except the true owner", as we have already mentioned; but since his right is not available against everybody, it is not a right *in rem* if we follow the logic in question. It seems hardly necessary to say that a definition of these terms which leads to a classification of this kind is not only not helpful but confusing.

[TO BE CONCLUDED.]

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